The Muslim WORLD

Caliphate and Political Jurisprudence in Islam: Historical and Contemporary Perspectives

Mohammad Hashim Kamali*
International Institute of Advanced Islamic Studies, Malaysia

Introduction

Notwithstanding the long history of scholarship on the caliphate (*khilāfa*) and governance in Islam, uncertainties persist over legitimacy issues, methods of succession, and correct understanding of its religious and civilian dimensions. There is general agreement that the community, or *umma*, is the locus of all political authority and that the head of state acts as its representative (*wakīl*). Yet writers on political jurisprudence and constitutional law have differed over the modalities which articulate this vision. A measure of uncertainty has also been added by the prevailing tendency in modem writings to relate the nation-state of eighteenth century Europe to ideas and events of earlier centuries. This article reviews the contributions both of classical and contemporary scholars to the subject and ascertains the extent to which our understanding of state and government now can be enriched by that legacy. Our enquiry also ascertains points of departure between the earlier and more modern conceptions of legitimacy and representation. The question we pose concerns how legitimacy is ascertained through the methods the early commentators adopted for designation of the head of state and succession to the rule. How can their collective insights enrich our approaches to leadership and legitimacy issues in our times?

Legitimacy and Political Power

There is no mention of state and government in the Qur'an or *ḥadīth*. It is the *umma* which is the main audience and carrier of the Qur'anic messages on justice, trusteeship (*amāna*), bidding good and forbidding evil (*ḥisba*), consultation (*shūrā*) and so forth. Political authority in Islam is, therefore, vested in the *umma*, just as is also the case, to a large extent, with regard to legislative authority. The former is exercised through *bayʿa* (pledging of allegiance) and the latter through general consensus (*ijmāʿ*). The community elects the

*This paper is based on my presentation at the First Symposium for *New Conversations in Islamic and Christian Political Thought* at Worcester College, University of Oxford, United Kingdom, 14–15 September 2013. I would like to thank the co-convenors for inviting me to partake in this important and timely project across the two traditions, and especially to Afifi al-Akiti for his scholarly effort and for considerably improving this paper.

© 2016 Hartford Seminary.
DOI: 10.1111/muwo.12145

head of state who acts as its representative and has the authority ultimately to depose him in the event of manifest violation of the trust of office. This last refers for the most part to the Qur'anic mandates on a set of principles just mentioned. The state as such has no normative existence and exercises delegated authority vested into it by the community.

Legitimacy is manifested in the valid exercise of *bayʿa* and *wakāla* (representation). *Bayʿa* is an elective procedure that takes place in two stages as explained below, and *wakāla* is a social contract duly concluded by agreement and consent of the contracting parties. Examining the methods of investiture and succession thus constitutes the main theme of this article.

Political Jurisprudence: Characteristics, Uncertainties, and Changing Trends

Political jurisprudence and constitutional law are among the most under-developed areas of *fiqh* (jurisprudence), in contrast, for instance, to matters of worship and matrimonial law on which their *fiqh* is exceedingly elaborate. A great deal of what has been written in the past expatiate on the caliphate, and in particular, the person of the caliph, and pay scant attention to the norms that ensure legitimacy. As a result, the literature that has come about is still not only found wanting of critical evaluation on the nature of the caliphate, but also on its subsequent developments and especially now with the prevalence, for instance, of the nation-state.

Ibn Qayyim al-Jawziyya (d. 1350) spoke of rigidity and stagnation in the writings of political jurists, underlying their sterile and acquiescent blueprint which prompted the caliphs to rule by decree, and the result was marginalisation of the *sharīʿa* (divinely-inspired law). Al-Qaraḍāwī recounts Ibn Qayyim on the back cover of his renowned book, *Min fiqh al-dawla fī l-Islām* (On the Jurisprudence of State in Islam),[1] adding that even in twentieth-century Muslim writers continue talking about the caliphate, centuries after its demise, oblivious to the fact that political realities have radically changed. Al-Qaradawi has no section or chapter on the historical caliphate and devotes his work entirely to an exposition of the basic characteristics of an Islamic system of rule, whether theocratic or civilian, acceptance or otherwise of political parties, participation of women and non-Muslims, Islam and democracy, representative assemblies and so forth. Al-Qaraḍāwī's larger work, *al-Siyāsa al-sharʿiyya fī dawʾ nuṣuṣ al-sharīʿa wa-maqāṣiduhā* (The Divinely-Inspired Polity in the Light of Scriptural Texts and Their Purposes),[2] is preoccupied with identifying the lines of convergence between *sharīʿa* and *siyāsa* (policy), paying much attention to the overriding objectives (*maqāṣid*) of the *sharīʿa*, public interest (*maṣlaḥa*), and how discretionary judgment by government leaders (*ulu-l-amr*) relates

[1] Yūsuf al-Qaraḍāwī, *Min fiqh al-dawla fī al-Islām* (Cairo: Dar al-Shoruq, 1997), 200.

[2] Yūsuf al-Qaraḍāwī, *al-Siyāsa al-sharʿiyya fī dawʾ nuṣuṣ al-sharīʿa wa-maqāṣiduhā* (Cairo: Maktaba Wahba, 1998).

© 2016 Hartford Seminary.

to the scriptural guidelines of the Qur'an and *ḥadīth*. Legitimacy of rule is thus clearly located in the *sharīʿa* and conformity to the scriptural guidelines of Islam.

Uncertainties began to set in at an early stage. The orthodox caliphate (*khulafāʾ rāshidūn*) of the early decades of Islam had barely realised its potential before persistent military conflicts led to the subsequent change of the caliphate to a monarchy (*mulk*), and irregularities of dynastic rule exposed it to intolerable disruptions. The republican features of the orthodox caliphate, especially with regard to *bayʿa*, consultation and representation were only nominally kept but otherwise subjugated to the vagaries of totalitarian rule. In Selim el-Awa's assessment 'many issues of interest to Islamic political thought and constitutional law remain shrouded in ambiguity.' It is perhaps the present generation of researchers, el-Awa added, that will contribute to the development of constitutional law in a way 'that would suit the requirements of our age and address issues of concern to us at present.'[3]

Aḥmad Huraydī, a former Mufti of Egypt, observed that the political order that held sway in the Muslim lands over the centuries from the Umayyads to the end of the Ottomans did not, on the whole, comply with the principles of Islam, and those who wrote on Islamic government focused their attention on dynastic practices which did not reflect normative principles, but only expounded the history of government in those times, and there is 'a big difference between the two.'[4]

Juristic works on the historical caliphate are on the whole concerned with the methods of designation of caliph into office, succession to the rule, rights and duties of the caliph, and institutional blueprint on the judiciary, vizierate, the army, taxation, police duties, crimes and punishments and so forth. This literature departs, on the whole, from the republican tenor of the orthodox caliphate, and has therefore come under scrutiny over issues of concern to legitimacy and succession. Writers such as al-Māwardī (d. 1058), Abū Yaʿlā al-Farrāʾ (d. 1066) and al-Juwaynī (d. 1085), who wrote on the caliphate frequently referred to the precedent of the orthodox caliphs, which is generally considered authoritative, even if it lasted for a relatively short period of thirty years.[5] Yet the overriding concern on the part of political jurists to reconcile that precedent with dynastic politics influenced their writings such that their conformity to the early precedent became questionable. Subsequent writers such as Ibn Taymiyya (d. 1328) and Ibn Khaldūn (d. 1406) introduced new approaches not necessarily linking with the Māwardian premises.

In his inaugural speech upon taking office, the first caliph Abū Bakr (d. 634) addressed the people of Medina to say: 'O people! I have been entrusted with authority

[3] Mohamed Selim el-Awa, *al-Fiqh al-Islāmī fī ṭarīq al-tajdīd*, 2nd ed. (Beirut: al-Maktab al-Islāmī, 1998), 44.

[4] Lecture series by Aḥmad Huraydī held at the University of Cairo, as quoted in Fuʾād Aḥmad, *Uṣūl niẓām al-ḥukm fī al-Islām* (Alexandria: Muʾassasat Shabāb al-Jāmiʿa, 1991), 15–16.

[5] The verdict/*fatwā* of Companions is also authoritative in matters of concern to the principles of Islamic jurisprudence (*uṣūl al-fiqh)* under the rubric, in particular, of *fatwā al-ṣaḥābī*. For details on this rubric, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd ed. (Cambridge: Islamic Texts Society, 2003), 313–23.

© 2016 Hartford Seminary.

over you, but I am not the best of you. Assist me when I am right, but stop me when I am wrong.' Abū Bakr's successor, ʿUmar b. al-Khaṭṭāb (d. 644), similarly said in his inaugural speech after receiving general *bayʿa* of the Medinans to: 'rectify any deviation you might see on my part.'[6] Subsequent developments in political thought evidently lost touch with the republican spirit of that precedent.

The Constitution of Medina (*Dustūr al-Madīna*) which the Prophet drew up after his migration to Medina in 622 laid the foundations of a new community under his leadership. Much attention was paid in this document to establishing a basis of cooperation and cohesion between the Emigrants (*muhājirūn*), the Helpers (*anṣār*) and the Jews. Issues of leadership and subjugation of powerful tribes to the authority of the nascent government, principles of equality and justice, freedom of religion, right of ownership, freedom of movement and combating crime were among the main preoccupations of this document. Thus it was provided that 'the Jews of Banū ʿAwf will be treated as one community with the Believers. . .The same applies to the Jews of Banū al-Najjār.'[7] Also that 'the Jews have their own religion and the Muslims theirs. This will also apply to their freedmen.'[8] This document is often cited as basic authority for the notion of common citizenship in its commitment to equality and citizens' participation in public affairs. This can also be said of the Prophet's landmark Farewell Sermon (*ḥajjat al-widāʿ*), especially in the part where it reads: 'O People, your Creator is one; you are all from the same ancestor. All of you are from Adam, and Adam was created from earth.'[9] Almost all of the Qur'an had been received by then, and the Prophet's Farewell Sermon resonated many of the Qur'anic teachings on equality and human dignity.[10]

Al-Māwardī's renowned *al-Aḥkām al-sulṭāniyya* (The Ordinances of Government) on the caliphate has been influential. He wrote at a time when the emirs and military rulers of outlying provinces had taken over much of the effective power of the caliph in Baghdad. In an attempt to vindicate the caliph, al-Māwardī emphasised the caliph's role as the patron of religion and *sharīʿa*. Abu Yaʿlā and al-Juwaynī were exposed to essentially the same influences and held similar views.[11] They paid more attention to the

[6] See for details of these inaugural speeches, Mohammad Hashim Kamali, *Citizenship and Accountability of Government: An Islamic Perspective* (Cambridge: Islamic Texts Society, 2011), 199.

[7] Constitution of Medina (art. 25–26). An English translation of the *Dustūr al-Madīna* is in W. Montgomery Watt, *Islamic Political Thought: The Basic Concepts* (Edinburgh: Edinburgh Univ. Press, 1968), 130–4.

[8] Constitution of Medina (art. 25).

[9] Quoted in Ibn ʿAbd Rabbih, *Kitāb al-ʿiqd al-farīd*, eds. Aḥmad Amīn, Aḥmad al-Zayn and Ibrāhīm al-Abyārī, 7 vols. (Cairo: Lajnat al-Taʾlīf, 1965), 2:357.

[10] Note for instance, *Qur'an* 49:13 (*al-Ḥujurāt*): "O people! We have created you from a male and a female and made you into tribes and nation so that you may know one another. The most noble of you in the eyes of God is the most righteous of you.' Also, *Qur'an* 17:70 (*al-Isrāʾ*): 'We have bestowed dignity on the progeny of Adam. . .and conferred on them Our special favours.'

[11] Al-Māwardī and al-Juwaynī were followers of the Shāfiʿī school of law, whereas Abū Yaʿlā was a Ḥanbalī. Al-Māwardī and Abū Yaʿlā were both career judges, whereas al-Juwaynī, the teacher of al-Ghazālī, was a respected scholar. His teaching circles were said to have been attended by some three hundred *fiqh* scholars. They all wrote at a time when Shiʿi and Muʿtazilī doctrines had become widespread and drew the attention of rulers and *'ulamāʾ* alike.

© 2016 Hartford Seminary.

realities of the Abbasid state of their time than the foundational guidelines of the Qur'an and Sunna. They paid scant attention to consultation, for example, and have not devoted a section or chapter to equality and basic rights.

The course of events in Ibn Taymiyya's time, notably the fall of Baghdad to the Mongols in 1258, marked the practical extinction of the caliphate. Since Ibn Taymiyya found no indication of a caliphate in the Qur'an or Sunna, he departed from the premises of the Māwardian theory. Instead he called attention to the implementation of *sharīʿa* and a *sharīʿa*-oriented polity (*siyāsa sharʿiyya*), in preference to *khilāfa,* which he thought was rather short-lived. What was important, he stressed, was commitment to a set of principles the *sharīʿa* had enunciated. It was this renewed emphasis that characterised Ibn Taymiyya's idea of a *sharīʿa* state, which proved evidently influential. Yet his conception of *siyāsa sharʿiyya* also marked a move in the direction of a judicious polity that went in some ways beyond the *sharīʿa* and envisaged a government that made decisions on the basis of both scriptural text and practical exigency, as explained below.[12]

Ibn Khaldūn's writings on monarchy (*mulk*) and its supporting idea of group solidarity (*ʿaṣabiyya*) in the ruling circles differed from the juristic approach of the *ʿulamāʾ* and was predicated on the legitimacy, in principle, of hereditary rule that was then prevalent. Ibn Khaldūn observed that if the Muslim community found it difficult to restore the orthodox caliphate, then it should be legitimate for them to establish a *mulk* founded on *ʿaṣabiyya* of the politically dominant group, which is guided, in turn, by rational laws and public interest. Thus he distinguished between two types of monarchy, namely valid monarchy (*mulk ḥaqīqī*) and deficient monarchy (*mulk nāqiṣ*). The former is based on considerations of public interest and rational laws, and it provides an acceptable alternative to caliphate. *Mulk nāqiṣ* is, on the other hand, based in brute force rather than *ʿaṣabiyya* and it is destined to decline. Ibn Khaldūn thus considered rationality, public interest, and *ʿaṣabiyya* as the main criteria of legitimacy.[13]

We note that the Māwardian theory and its detailed elaborations do not necessarily embody a religious obligation. Some of its detailed conditions, such as the requirement that the caliph be from Qurayshite descent, or that he be a *mujtahid*, as well as the proviso that insisted on the territorial unity of the caliphate, became increasingly tenuous and detached from reality.

Methods of Installing the Caliph

The Māwardian theory validated two methods for the designation of caliph, or imam, into office: (1) election by the *ahl al-ḥall wa-l-ʿaqd* (lit. those who dissolve and resolve—henceforth referred to as *Ahl*); and (2) nomination by the outgoing caliph (i.e., *wilāyat al-ʿahd*, or *istikhlāf*). A third method that is considered as an emergency situation (*al-iḍtirār*) is that of military takeover (*al-istīlāʾ*, and *al-shawka*). I shall review each of these, but mention

[12] See pp. 398–399 below.

[13] Cf. Muhammad Mahmud Rabi', *The Political Theory of Ibn Khaldūn* (Leiden: Brill, 1967), 145f.

© 2016 Hartford Seminary.

at the outset that the first two are deemed to be founded in the precedent of the orthodox caliphs, *khulafāʾ rāshidūn*, whereas the third was developed during the Abbasid period, but became frequent in the course of time. A glance at the precedent of the orthodox caliphs shows that notwithstanding some differences in the methods by which they were each designated into office, they had three features in common: (1) consultation among community leaders; (2) representation by the *Ahl*; and (3) pledge of allegiance (*bayʿa*).

Leadership (*imāma*) is a contract which is concluded through *bayʿa* that occurs in two stages: special *bayʿa*, also known as the *bayʿa* of contract (*bayʿa khāṣṣa*, or *bayʿat al-inʿiqad*) which occurs between the *Ahl* and the prospective caliph. This is then followed by a general pledge (*bayʿa bāmma*) between the designated imam and the community at large. The Māwardian theory maintains that the contract of imamate is concluded on the first of these two occasions, and it is enough as of that time to give rise to rights and obligations, such as the duty of obedience, and assistance (*ṭāʿa wa-nuṣra* respectively) to the new caliph. Many writers maintain that the two-tiered *bayʿa* was practiced by both Abū Bakr and ʿUmar.[14] Thus it is reported that immediately after the Prophet's burial on a Wednesday, the Emigrants and Helpers held a meeting at Saqīfa Banī Sāʿida, where ʿUmar nominated Abū Bakr and the first *bayʿa* took place on that occasion. The following day Abū Bakr convened a larger meeting in the mosque where ʿUmar spoke on Abū Bakr's suitability for leadership, and then asked the people to pledge *bayʿa* to him. The general *bayʿa* took place then and Abū Bakr became caliph.[15]

In their articulations of the methods of the caliph's investiture, both al-Māwardī and Abū Yaʿlā open their relevant sections by saying (in almost identical words), and I quote al-Māwardī, that 'the imamate is concluded in two ways, one of which is by the election of the *ahl al-ʿaqd wa-l-ḥall* (sic), and the other by the covenant of the outgoing imam.'[16] Both have later discussed takeover of power by military force (*imārat al-istīlāʾ*) in separate sections of their respective books, and both describe it as an emergency situation. While both use the imamate or caliphate in their discussion of the first two methods, they employ *amīr* (military commander) and *imāra* (military force) when they refer to a military takeover.[17] These methods are separately discussed below.

---

[14] Scholars who distinguish the two *bayʿa*s include Ibn Hishām (d. 833), Ibn Qutayba (d. 889), al-Muḥibb al-Tabarī (d. 1295), and al-Qalqashandī (d.1418), the author of *Ṣubḥ al-aʿsbā*. See Maḥmūd ʿAbd al-Majīd al-Khālidī, *Qawāʾid niẓām al-ḥukm fī al-Islām* (Kuwait: Dār al-Buḥūth al-ʿIlmiyya, 1980), 262. Obedience and assistance are the rights of the imam. Most jurists have expounded ten duties pertaining to the imam, including the administration of justice, the defence of borders, the fulfilment of financial obligations, etc.

[15] Ibn Hishām, *Sīrat Ibn Hisham*, as quoted in al-Khālidī, *Qawāʾid niẓām*, 262–66.

[16] Al-Māwardī, *al-Aḥkām al-sulṭāniyya wa-l-wilāyat al-dīniyya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000), 7; Abū Yaʿlā al-Farrāʾ, *al-Aḥkām al-sulṭāniyya*, ed. Muḥammad Ḥamid al-Fiqī, 2nd ed. (Cairo: *Muṣṭafā al-Bābī al-Ḥalabī*, 1966), 23. The only difference in the two wordings is that Abū Yaʿlā uses the standard phrase *ahl al-ḥall wa-l-ʿaqd*, in contrast to *ahl al-ʿaqd wa-l-ḥall*.

[17] Cf. al-Māwardī, *Aḥkām al-sulṭāniyya*, 7; and Abū Yaʿlā al-Farrāʾ, *Aḥkām al-sulṭāniyya*, 37; respectively for their discussion on the *imārat al-istīlāʾ*.

© 2016 Hartford Seminary.

Method I: Election by the Ahl al-Ḥall wa-l-ʿAqd

The *ahl al-ḥall wa-l-ʿaqd*[18] refers to a council of elders who nominate and elect the caliph. The *Ahl* pledge *bayʿa* to their proposed candidate, which he accepts and the contract of imamate is thus concluded. The *Ahl* must possess at least three qualifications: uprightness of character (*ʿadāla*) that include trustworthiness, piety and stability of character; 2) knowledge that enables one to know and ascertain credible candidates for the imamate; and 3) wisdom and judgment (*al-raʾy wa-l-ḥikma*) that enables one to make appropriate decisions and have insights into the best interests of the people.[19] Whereas al-Māwardī uses *ahl al-ikhtiyār* interchangeably with *ahl al-ḥall wa-l-ʿaqd*, he draws a distinction between these and *ahl al-imāma*, the latter referring to those qualified to be the imam, and must fulfill seven qualifications (see below) compared to the *ahl al-ikhtiyār* who need fulfill only three—as just mentioned.[20]

Al-Māwardī proposed the following procedure for *bayʿa*, which also appears *in toto* in the text of Abū Yaʿlā:

> When the *ahl al-ḥall wa-l-ʿaqd* assemble to ascertain the conditions of suitable candidates for imam and find through their reasoning and *ijtihād* that one of them is best qualified and fulfills the conditions of the imamate, and that the people are most likely to obey him and pledge their allegiance promptly to him, they may offer the matter to him. If he accepts the offer, they pledge *bayʿa* to him. The entire community is then bound by offering him their *bayʿa* and committed thereby to obey him.[21]

Abū Yaʿlā spells out the wording in which the *Ahl* offer their *bayʿa* to the would-be imam as follows: 'we pledge our consent and *bayʿa* to you [on account of your commitment] to establish justice and fairness, and fulfill all the duties of the imam—[when this is said] there remains no need for a hand-shake.'[22] A fuller explanation appears in Ibn Khaldūn who described *bayʿa* as a:

---

[18] The phrase *ahl al-ḥall wa-l-ʿaqd* does not occur in the Qur'an or *ḥadīth*. The nearest Qur'anic term to this would appear to be *ulu-l-amr* (those in charge of public affairs) in *Qur'an* 4:59 (*al-Nisaʾ*), but since the concept of *khilāfa*/caliphate as a political institution is not mentioned in the Qur'an itself, Muslim jurists might have hesitated to use the original Qur'anic term for something which does not occur therein. *Ahl al-ḥall wa-l-ʿaqd* is thus employed in the language of political jurisprudence, and it occurs alongside a number of other equivalent expressions, such as *ahl al-ikhtiyār* and *ahl al-ijtihād* (those competent to elect, and who conduct their own judgement respectively). Some have also used *ahl al-shūrā* (those competent to give counsel), and *al-ʿulamāʾ wa-l-ruʾasāʾ wa-wujūh al-nās* (community leaders inclusive of the ulama). In the Māwardian theory all of these refer to persons whose grant of *bayʿa* to a would-be leader concludes the imamate contract.

[19] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 6; Abū Yaʿlā al-Farrāʾ, *al-Aḥkām al-sulṭāniyya*, 24; Muḥammad Diyāʾ al-Dīn al-Rayyis, *al-Naẓariyyāt al-siyāsiyya al-Islāmiyya*, rev. ed. (Cairo: Dār al-Turāth, 1976), 223–24. Ibn Khaldūn has termed the second of these as *kafāʾa* (efficiency).

[20] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 6.

[21] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 7–8; Abū Yaʿlā al-Farrāʾ, *al-Aḥkām al-sulṭāniyya*, 24.

[22] Abū Yaʿlā al-Farrāʾ, *al-Aḥkām al-sulṭāniyya*, 25.

© 2016 Hartford Seminary.

> commitment to obey, such as when a person pledges himself to a ruler that he will follow his views concerning himself and the affairs of Muslims. . .When they [Arabs] gave *bayʿa*, they would shake hands for added emphasis. This resembled the act of buyer and seller upon concluding a deal, which is why it is called *bayʿa* (coming from *bayʿ*—sale). . .in the *ḥadīth* [literature] it refers to *bayʿa* that the Prophet (peace be upon him!) received on the Night of ʿAqaba [in 622], and then under the Tree [known as *bayʿat al-riḍwān* in 628].[23]

In the course of time, Ibn Khaldūn adds, *bayʿa* was corrupted as caliphs began to compel people to give it, hence it became known as the 'oaths of allegiance' (*aymān al-bayʿa*). When the famous early jurist, Mālik (d. 795) gave a *fatwā* that any oath taken under duress has no effect, rulers and governors disliked it and put him in hardship for it. The *bayʿa* to kings and monarchs was later given by the kissing of hands, feet, or kneeling down, and became known as the *bayʿa* of obedience. The customary handshake was also abandoned.[24]

Disagreement arose concerning the minimum number of the *Ahl* that may conclude the imamate contract, and on the type of agreement—whether by consensus, by majority of the *Ahl*, or of the whole community, or indeed by any convincing number. An early Mu'tazilite view attributed to Abū Bakr al-Aṣamm (d. 816), for example, held that the imamate can only be concluded by the general consensus of the entire community. Another view maintained that it requires the majority of the *Ahl* who represent every major city in the realm.[25] On the question of quorum, views differed from forty, down to six, five, four, three, two and even one—each referring to some number, be it of those who pledged *bayʿa* to Abū Bakr at the gathering of the Saqīfa (five persons),[26] the number of witnesses for proof (either two, which is normal, or four—required for proof of adultery or *zinā*), or the number of persons required for the Friday congregational prayer (forty), or the number to conclude a contract (two) and so forth. Al-Māwardī expounded and then concluded these rather indulgent elaborations by saying, firstly that any number which is feasible to convene, usually but not necessarily, from the capital city and its environs is sufficient—thus disposing with the need to cover the entire population, and then also that consensus of the *Ahl* is not a requirement; any number from among them that inspires conviction is sufficient. This is said to be the position of the majority of jurists.[27]

---

[23] Ibn Khaldūn, *Muqaddimat Ibn Khaldūn*, ed. Ḥāmid Aḥmad al-Tāhir (Cairo: Dār al-Fajr, 2004), 266.
[24] Ibn Khaldūn, *Muqaddima*, 266.
[25] Cf. al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 7; al-Shahrastānī, *al-Milal wa-l-niḥal*, as quoted in al-Rayyis, *al-Naẓariyyāt*, 226.
[26] The five who pledged *bayʿa* to Abū Bakr at the Saqīfa of Banī Sāʿida were ʿUmar, Abū ʿUbayda b. al-Jarrāḥ (d. 639), Asīd b. Ḥuḍayr (d. 641), Bashīr b. Saʿd (d. 633), and Sālim b. Maʿqal (d. 633), the freedman of Abū Ḥudhayfa (d. 633).
[27] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 7; for further details see, al-Khālidī, *Qawāʾid niẓām*, 270–72; al-Rayyis, *al-Naẓariyyāt*, 226–27.

© 2016 Hartford Seminary.

Al-Juwaynī's discussion on the quorum of the *Ahl* refers to the views of al-Bāqillānī (d. 1012) to the effect that consensus of the *Ahl* is not a requirement:

> Given the position that consensus is not a requirement for conclusion of the contract of imamate, it follows that a particular number can also not be stipulated. Contracts in the *sharīʿa* are [normally] concluded by two parties. . .then it follows that one person is sufficient for the purpose of completion of the imamate contract.[28]

Al-Juwaynī adds: 'some of our colleagues have said' that contracts also require witnessing—is this then a requirement of the imamate?—for if there is no witness, one cannot be sure of someone concluding it in secrecy and then claiming to be a duly contracted imam. The marriage contract requires witnessing; the imamate should therefore not be ranked lower than the *nikāḥ* (marriage), hence publicizing it should be a requirement.[29] Al-Juwaynī disagrees, however, with al-Bāqillānī who claimed that this was [i.e., one person] a decisive position, saying that al-Bāqillānī's view cannot claim to be authoritative. He wrote that a larger number of the *Ahl* pledging allegiance adds to credibility and gives the contract a firmer foundation. But then al-Juwaynī adds:[30]

> The imamate becomes valid and effective even if the 'oath of allegiance' is sworn by a single person who is, however, of high social standing and who is known to have many disciples and supporters. He must be known to exact obedience from his people and his influential position must guarantee achieving the aforesaid objectives [that include defending and protecting the imam].[31]

It is separately reported that al-Ashʿarī (d. 936), al-Ghazālī (d. 1111) and al-Shahrastānī (d. 1153) also held that one person can validate the imamate contract without the stipulation of witnessing.[32]

In sum, the imamate contract can be concluded between even one *Ahl* and the prospective imam. The general *bayʿa*, which is a prerogative of the Muslim community, is thereby reduced to insignificance by a doubtful analogy to private contracts. Seemingly, this dubious contract is then made binding on the Muslim community as of the moment it is concluded!

In his articulation of the theory of imamate, al-Juwaynī further added:

> Women are not permitted to choose the imam or to pledge an oath of allegiance to him. . .we know for certain that they are never known to have participated in this process throughout the ages. . .furthermore, this is also not a

[28] Al-Juwaynī, *Kitāb al-irshād ilā qawāṭiʿ al-adilla fī uṣūl al-iʿtiqād*, ed. Zakariyyā ʿUmayrāt (Beirut: Dār al-Kutub al-ʿIlmiyya, 1995), 169.
[29] Al-Juwaynī, *al-Irshād*, 169.
[30] Al-Juwaynī, *al-Irshād*, 169.
[31] Al-Juwaynī, *al-Ghiyāthī: Ghiyāth al-umam fī iltiyāth al-ẓulam*, ed. Khalīl al-Manṣūr (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 38–39.
[32] Ibn Tāhir al-Baghdādī, *Uṣūl al-dīn*, as quoted in al-Rayyis, *al-Naẓariyyāt*, 227.

© 2016 Hartford Seminary.

> matter for slaves to participate even if they be knowledgeable, nor for ordinary men, who are not counted among scholars or men of great insight—these were never involved in the matter, nor were the *dhimmī*s involved in the process of installing imams. All of these are to be excluded from the ranks of the *ahl al-ḥall wa-l-ʿaqd*.[33]

Al-Juwaynī is, however, critical of al-Māwardī when the latter held the *dhimmī*s (non-Muslims) eligible to become a *wazīr al-tanfīdh* (executive minister)—as opposed to a *wazīr al-tafwīḍ* (prime minister). This according to al-Juwaynī 'is a trip without justification. . .for a *dhimmī*'s testimony is not accepted over Muslims. . .how can he be made a minister?'[34] Al-Juwaynī and al-Māwardī are in agreement, however, in disqualifying women from holding any ministerial post: 'Firmness of mind and determination are needed, women may be weak and may also be unable to participate directly in the execution of certain duties.'[35] Abū Yaʿlā concurred with al-Māwardī, and has, in fact, replicated him on this.[36]

*Method II: Covenant by the Outgoing Caliph (*Wilāyat al-ʿAhd*, or* Istikhlāf *)*

Although classical writers have listed *istikhlāf* as the second of the two methods under review, in time, it became effectively the preeminent one—thus disposing of the need for *bayʿa* from both the *Ahl* and the community at large. Numerous scholars have endorsed the validity of *istikhlāf* and many have claimed general consensus in its support. Thus wrote al-Māwardī: 'There is general consensus on the permissibility of the imamate contract through a covenant by the outgoing imam.'[37] Cited in authority for this is the precedent of the first two caliphs, Abū Bakr and ʿUmar, respectively. Abū Bakr designated ʿUmar to succeed him, and ʿUmar in turn designated six persons and assigned them the task to elect the next caliph. All this was done in the presence of the Companions, who gave their support and committed themselves to obey the nominated caliph.[38] A closer look at the manner by which Abū Bakr nominated ʿUmar tends, however, to set apart that precedent from the Māwardian descriptions of *istikhlāf*.[39]

---

[33] Al-Juwaynī, *Ghiyāth al-umam*, 34–35; see also al-Juwaynī, *al-Irshād*, 170.
[34] Al-Juwaynī, *al-Irshād*, 170; al-Juwaynī, *al-Ghiyāthī*, 72.
[35] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 31.
[36] Abū Yaʿlā al-Farrāʾ, *al-Aḥkām al-sulṭāniyya*, 31–32.
[37] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 11.
[38] Ibn Khaldūn, *Muqaddima*, 266–67.
[39] Ibn Qutayba (d. 889) in his *al-Imāma wa-l-siyāsa* provides a different account of Abū Bakr's nomination of ʿUmar, which is as follows: When symptoms of death approached Abū Bakr, he became very anxious as to who should succeed him to the *khilāfa*. After much deliberation, he decided to nominate ʿUmar. He called ʿUthmān (d. 656) to his bedside and dictated to him the deed of succession. When the news spread, people began to be inquisitive. Then he convened a general assembly of the people. He addressed them and said: 'If you so desire, you may sit together and elect a person whom you like; but if you wish that I should use my discretion in this matter on your behalf, then I assure you by the One

© 2016 Hartford Seminary.

As for the validity or otherwise of relatives designating one another as their successors, al-Māwardī refers to three views, one of which is that it is not valid for the outgoing imam to designate his son or his father unless he consults the electorate (*ahl al-ikhtiyār*; the community leaders); if they approve it, it is valid.[40] The second view allows this: in his capacity as the trusted leader of the community, the caliph acts in due observance of that trust (*amāna*) and this removes the doubt over the tie of kinship. The third view is that the outgoing imam may give *bayʿa* to his father, brother or another relative to succeed him, but not to his son—for fear of strong natural bias.[41]

According to Abū Yaʿlā, *istikhlāf* to one's relative becomes effective only for a person who is suitably qualified and who obtains general consent of the Muslim community:

> It is permissible for him [the imam] to appoint someone who is affiliated to him through relationship of paternity or sonship provided that the would-be imam possesses the qualifications to be an imam. This is because the imamate does not become valid and effective based on the act of *istikhlāf* per se; rather it is concluded by the consensus of Muslims.[42]

Al-Juwaynī has also claimed general consensus (*ijmāʿ*) for *istikhlāf* and cited as authority the precedent of Abū Bakr and ʿUmar—as reviewed above. No one, he wrote, has disputed it in principle, although many have disputed the qualifications of particular individuals and nominees. Al-Juwaynī added that the nominee must accept the offer, without which the contract is not concluded.[43] This was also the view earlier held by al-Māwardī.[44] The father may designate his son, adds al-Juwaynī, provided that the latter's suitability is not disputed by others, but then he further added:

> I do not approve of following the practice of some caliphs in respect of passing the caliphate to their sons. This is because following the demise of the four Rightly-Guided Caliphs (*khulafāʾ rāshidūn*), the caliphate was characterised by use of force and fostering of the sense of superiority. Consequently,

---

other than whom there is no God that I will spare no pain in doing you the best service.' He then stopped and wept and the people wept with him and said: 'you are the best and most informed amongst us, so you choose for us.' And when the crowd dispersed, he called for ʿUmar and gave the deed of succession and said, 'Go to the people and inform them that this is my suggestion, and ask them if they hear it and obey it.' ʿUmar took the document and went to the people and addressed them. They all said, 'we are all ears and obedience to it.' [Quoted in Mian Mohammad Sharif (ed.), *History of Muslim Philosophy* (Wiesbaden: Otto Harrassowitz, 1963), 723].

[40] Al-Māwardī explains this in juristic terms by drawing an analogy to witnessing: the father is deemed to be acting as a witness to the eligibility of his son or father. Normally he is not allowed to do so, since testimony among close relatives cannot be admitted, but then if the *ahl al-ikhtiyār* approve of it, they can become witnesses of affirmation (i.e., *muzakkī*) to the first testimony which removes the element of suspicion. See al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 11.

[41] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 11–12.

[42] Abū Yaʿlā al-Farrāʾ, *al-Aḥkām al-sulṭāniyya*, 25.

[43] Al-Juwaynī, *Ghiyāth al-umam*, 64–65.

[44] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 12.

© 2016 Hartford Seminary.

> the right [of other Muslims] to assume the office of imam was denied and the imamate came to be based on the unjust system of monarchy.[45]

To the question al-Juwaynī raises whether consent of the electorate (*ahl al-ikhtiyār*) is a condition to conclude the contract, he acknowledged that some jurists had held different views, but he concludes that such a condition is not a requirement.[46] Al-Māwardī recounts that 'some scholars from Basra have held that seeking the consent of the *ahl-al-ikhtiyār* for *istikhlāf* is a requirement if it were to bind the Muslim community. . .The correct view is that *istikhlāf* is valid and effective and seeking the said consent is not necessary.'[47] Al-Māwardī explained that when ʿUmar pledged his *bayʿa* to Abā Bakr at the Saqāfa assembly, it was not contingent on the consent of the other Companions.

One may hasten to add that this is rather a weak explanation in light, particularly, of a renowned statement of ʿUmar that 'the one who designates himself or another person for leadership (*imāra*) without consulting the Muslim community, he should be killed.'[48] To this one may add further that ʿUmar's *bayʿa* did not finalise Abū Bakr's imamate; rather it was finalised by virtue of the general *bayʿa* he secured the following day.[49]

Abū Yaʿlā adds that the presence of the *Ahl* or their witnessing of *istikhlāf* by the outgoing imam is not a requirement. He explained it as thus: the outgoing imam's covenant of *istikhlāf* is not a contract of the imamate per se; for if it were, there will be two imams at the same time, which is *ultra vires*. If *istikhlāf* is not a contract, then it follows that witnessing it is also not necessary.[50]

*Method III: Military Takeover (***Istīlāʾ***, also* **Shawka***)*

This is when a person declares himself as imam through military takeover without the consent of community leaders or designation by the outgoing imam: a *coup d'état*. Leadership through military domination evidently departs from the *sharīʿa* principles of *bayʿa*, consultation and contract, yet it has been recognised under emergency conditions, which had become frequently recurrent.[51] Al-Māwardī recognised this and wrote of *istīlāʾ* as a 'departure from valid precedent [apparently of *bayʿa* and *istikhlāf*]. . .yet it may be recognised for the sake of preservation of the law (*sharīʿa*) and the protection of religion.'[52] Al-Māwardī continued to stipulate seven conditions that must be met by the military commander. These are also normal conditions that any caliph would need to

---

[45] Al-Juwaynī, *Ghiyāth al-umam*, 124.
[46] Al-Juwaynī, *Ghiyāth al-umam*, 66- 67.
[47] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 11.
[48] Al-Muttaqī al-Hindī, *Kanz al-ʿummāl fī sunan al-aqwāl wa-l-afʿāl*, 12 vols. (Hyderabad: Dāʾirat al-Maʿārif al-ʿUthmāniyya, 1945–64), 5:465 (no. 2577).
[49] Cf. al-Khālidī, *Qawāʾid niẓām*, 275.
[50] Abū Yaʿlā al-Farrāʾ, *al-Aḥkām al-sulṭāniyya*, 25.
[51] Al-Rayyis, *al-Naẓariyyāt*, 282–83.
[52] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 39.

© 2016 Hartford Seminary.

fulfill—as he stressed. Briefly, these are: (1) preservation of the imamate as succeeding the Prophet and management of public affairs; (2) adherence to religion and prevention of hostility and lawlessness; (3) protection of unity and fraternity among Muslims; (4) administration of justice; (5) due fulfillment of financial obligations and expenditures; (6) enforcement of prescribed penalties (*ḥudūd*); and (7) uprightness that ensures the *amīr*'s/commander's rightful claim to obedience.[53]

Abū Yaʿlā has cited one of the two variant views of Ibn Ḥanbal (d. 855) in support of *istīlāʾ*: through his contemporary, ʿAbdūs b. Mālik al-ʿAṭṭār, who attributed this view to Ibn Ḥanbal: 'whoever rises to power at the point of the sword and becomes caliph and then becomes known as the 'Commander of the Faithful', it is impermissible for anyone who believes in God and the Last Day to retire at night before recognising him as leader, be he [the leader] righteous or impious.'[54]

Al-Juwaynī has similarly approved *istīlāʾ* on condition, however, that the military commander is competent and trustworthy. But if it is someone incompetent and has a reputation for transgression (*fisq*) and wrongdoing, 'his self-designation is impermissible, and if he does install himself, it is not valid in the first place.'[55] Al-Juwaynī visualises the following three scenarios: (1) when the self-designated ruler is competent and fulfills the conditions of imam; (2) when he does not fulfill them, but he is efficient; and (3) when the person is unsuitable altogether.

In the first two cases the imamate is valid, and the contract is deemed to be unilaterally concluded: the would-be imam thus conceptually acts on behalf of both parties to the contract (*wa-huwa fī ḥukm al-ʿāqid wa-l-maʿqūd la-hu*). As for the third scenario, it is invalid, but may be tolerated if disobeying the military ruler leads to turmoil and conflict.[56] Al-Qalqashandī (d. 1418) has also endorsed this position 'so that the affairs of the community (*umma*) are managed and their unity is preserved.'[57]

The critics of *istīlāʾ* insist on the *sharīʿa* requirement of *bayʿa* based on consent and election (*al-riḍā wa-l-ikhtiyār*), as affirmed in the Qur'an, Sunna and general consensus. 'Anyone who subjugates the community (*umma*) by force destroys the foundation of political order Islam has envisaged. Hence it is usurpation and therefore unlawful.'[58] Quoted in support of this view is the protest and uprising of a group of leading Companions and the people of Medina against the second Ummayad caliph, Yazīd b. Muʿāwiya (d. 683), and also the statement of ʿUmar—quoted earlier—that anyone who resorts to

[53] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 40.
[54] Abū Yaʿlā al-Farrāʾ, *al-Aḥkām al-sulṭāniyya*, 23; see also Muḥammad M. Amzayān, *Fī al-fiqh al-siyāsī: Muqāraba taʾrīkhiyya* (Casablanca: Maṭbaʿat al-Najāḥ, 2001), 162.
[55] Al-Juwaynī, *Ghiyāth al-umam*, 144.
[56] Al-Juwaynī, *Ghiyāth al-umam*, 145–150.
[57] Al-Qalqashandī, *Maʾāthir al-ināfa fī maʿālim al-khilāfa*, as quoted in al-Khālidī, *Qawāʿid niẓām*, 279.
[58] Al-Khālidī, *Qawāʿid niẓām*, 282.

© 2016 Hartford Seminary.

force to become leader should be put to death. ʿUmar has further stated that 'the caliphate cannot materialise without consultation.'[59]

Ibn Taymiyya did not recognise the historical caliphate as a valid articulation of the Islamic vision of leadership. There was nothing in the Qur'an and Sunna to support it and Muslims are not under any obligation to follow it. Qamaruddin Khan, author of *The Political Thought of Ibn Taymiyyah*, thus argued: 'Ibn Taymiyya is most critical of the institution of the *ahl al-ḥall wa-l-ʿaqd*. . .for he does not know from where this body draws its authority and how it is constituted. . .Ibn Taymiyya throws into the waste-paper basket with scorn al-Māwardī's sterile and subtle discussion on the minimum number of candidates necessary for election.'[60] In Ibn Taymiyya's view, a real election never took place in Islamic history, and that whenever the *Ahl* tried to do so, it has always been only to ratify and give a juridical façade to a dictatorship of fact.[61]

For Ibn Taymiyya, the state is not founded by the allegiance of a few ulama or the *Ahl*, but by cooperation of the entire community. The rightful *imāma* is instituted through the oath of *mubāyaʿa*, which bind the imam and community to each other. The contract of *mubāyaʿa* manifests the common will of the community, and the support particularly of those who wield real influence or power (*ahl al-shawka*). These last refer to persons, irrespective of their profession and station in life, who command respect in the community. Their support is indispensible for the imamate. The state comes into being by the support and allegiance of the *ahl al-shawka*, and then under their influence, the community declares its allegiance to the imam and commits to obey him.[62]

Ibn Taymiyya seems to have taken the notion of *shawka* from al-Ghazālī, and then developed it as a substitute to the Māwardian idea of the *Ahl*. For Ibn Taymiyya, however, the ulama do not constitute a sacred clergy nor do they enjoy special privileges. Their cooperation for the institution of imamate is as essential as the cooperation of other effective groupings in the community. This same concept of *shawka* was later

[59] Al-Muttaqī al-Hindī, *Kanz al-ʿummāl*, 5:379 (no. 2354).

[60] Qamaruddin Khan, *The Political Thought of Ibn Taymiyyah* (Lahore: Islamic Book Foundation, 1983), 133.

[61] Khan, *Political Thought*, 133.

[62] In his *al-Iqtiṣād fī al-iʿtiqād* (as well as in his *al-Fadāʾiḥ al-Bāṭīniyya*), al-Ghazālī developed the idea of *shawka* and maintained that the imamate is instituted by power and influence, which is established, in turn, through *mubāyaʿa*. He further stated that *shawka* is achieved through the support of the majority of reliable persons of the age, or even when one person of very high standing and overwhelming *shawka* nominates someone who is well qualified to be the imam. In situations of emergency and where fear of sedition and violence becomes imminent, a military commander may be obeyed in order to curb disorder and chaos. But al-Ghazālī seems to have developed his thoughts on *shawka* for a different purpose. In his time the Seljuk Turks were in power in Baghdad. To maintain the integrity of the *umma*, he seems to have advanced a compromise theory of the caliphate that ascribed *shawka* to the Seljuk rulers. See al-Ghazālī, *al-Iqtiṣād fī al-iʿtiqād*, ed. ʿAbd Allāh Muḥammad al-Khalīlī (Beirut: Dār al-Kutub al-ʿIlmiyya, 2004), 129. See also, Khan, *Political Thought*, 162f.

© 2016 Hartford Seminary.

transformed by Ibn Khaldūn into his famous theory of *ʿaṣabiyya* (group solidarity) which he then developed in considerable detail.[63]

Ibn Taymiyya also thought that the seven-fold qualifications that al-Māwardī expounded were questionable, saying that only the orthodox caliphs, the *khulafāʾ rāshidūn*, might have possessed them. To the questions whether the imam had to be a *mujtahid*, and whether it was obligatory to choose the most eligible, and the next best, according to availability—Ibn Taymiyya responded that in the Ḥanbalī school (*madhhab*; pl. *madhāhib*), all three alternatives were permitted.[64] He then proposed two qualifications, namely of possessing power and trustworthiness (*al-quwwa wa-l-amāna*) which the imam must possess.[65]

In his seminal work *al-Siyāsa al-sharʿiyya* (The Divinely-Inspired Polity), which is a later work and essentially a commentary on the Qur'anic passage, *Qur'an* 4:58–59 (*al-Nisaʾ*), known as the *āyat al-umarāʾ*,[66] Ibn Taymiyya developed the notions of trusts and strength in governance and sought to apply them to all government leaders and officials. All government office-holders partake in *amāna*, and strength in individuals means strength not only of character but in respect of the relevant knowledge and qualifications. The main criterion of legitimacy of state and leadership is observance of the law, the *sharīʿa*. But then Ibn Taymiyya's idea of a *sharīʿa*-oriented polity (*siyāsa sharʿiyya*) is not tied to the scriptural text and precedent only, but it also integrates discretionary power as a necessary ingredient for the good management of public affairs. No government can, in other words, dispense with discretionary powers, especially over matters not regulated in the established laws—provided that discretionary power is exercised in harmony with the spirit and purpose of the *sharīʿa*.[67] And lastly, consultation is one of the essential duties of the imam, without which securing cooperation of the community would not be possible.[68]

---

[63] Cf. Khan, *Political Thought*, 137.

[64] Ibn Taymiyya, *al-Siyāsa al-sharʿiyya fī iṣlāḥ al-rāʿī wa-l-raʿiyya*, ed. ʿAlī Sāmī al-Nashshār and Aḥmad Zakī ʿAṭiyya, 2nd ed. (Cairo: Dār al-Kitāb al-ʿArabī, 1951), 170. See also Khan, *Political Thought*, 148.

[65] These are actually taken from the *Qur'an* 28:26 (*al-Qaṣaṣ*) and 12:54 (*Yūsuf*), which reads respectively, 'Surely the best of those that you can employ is one who is strong and trustworthy'; and 'From now own you will have our trust and power'.

[66] The two verses are: 'God commands you to render the trusts to whom thay are due, and when you judge among people, you judge with justice. . .' (4:58); and 'O believers! Obey God and obey the Messenger, and those charged with authority among you. If you dispute in any matter, refer it to God and the Messenger. . .' (4:59).

[67] For further details on the tradition of *siyāsa sharʿiyya*, see my chapter on 'Beyond the Shariʿah: An Analysis of Shariʿah-Oreinted Policy (*Siyasah Sharʿiyyah*)' in Mohammad Hashim Kamali, *Shariʿah Law: An Introduction* (Oxford: Oneworld, 2008), 225–246; and Mohammad Hashim Kamali, '*Siyāsah Sharʿiyyah* or the Policies of Islamic Government', *The American Journal of Islamic Social Science* 6 (1989): 59–81.

[68] Consultation is a Qur'anic principle addressed both to the Prophet and the Muslim community generally to determine their affairs through consultation. Cf. *Qur'an* 3:159 (*>l ʿImrān*) and 42:38 (*al-Shūrā*).

© 2016 Hartford Seminary.

Ibn Taymiyya's disciple, Ibn Qayyim's contribution to the same theme is presented in his work, *al-Turuq al-ḥukmiyya fī al-siyāsa al-sharʿiyya* (The Legal Pathways in the Divinely-Inspired Polity). The title is indicative of a binary division of the bases of judgment: namely that of *sharīʿa* and *siyāsa*, of sacred intent and human policy, and of scriptural text and practical exigency.

Modern Critiques of the Māwardian Theory

Pre-modern writings on the caliphate and leadership, on *khilāfa* and *imāma*, have come under scrutiny not just in our time but even earlier. Ibn Taymiyya's critique, as already reviewed, was based on two points, one of which was that the dynastic caliphate of the Umayyad or the Abbasid, for example, had departed from the basic premises of the orthodox Caliphs, the *khulafāʾ rāshidūn* of the early period immediately following the Prophet; and the other was that the bases of legitimacy in the Māwardian articulations were not devoid of forced logic and, therefore, can be less than convincing.

Twentieth-century writings on state and government are cognisant of subsequent changes and pay little attention to theories on the caliphate, and employ instead alternative terminologies such as modern works bearing the titles *Niẓām al-ḥukm fī al-Islām* (The System of Government in Islam),[69] *al-Niẓām al-siyāsī fī al-Islām* (The Political System in Islam) or its near equivalent, *Naẓariyyāt al-dawla fī al-Islām* (The Theories of State in Islam),[70] *Uṣūl al-ḥukm fī al-Islām* (The Principles of Government in Islam),[71] and even the classic title, *al-Siyāsa al-sharʿiyya* (The Divinely-Inspired Polity).[72] Much of this literature shares in common certain perspectives which include: (1) recourse should be had to the authoritative sources of the *sharīʿa* and reliable segments of *fiqh*, not only of the four leading schools but of all the *madhāhib* and individual scholars; (2) theoretical guidelines should be read side by side with actual reality. The community and succeeding generations of Muslims are entitled to devise their own approaches to state and government; (3) consultation, popular will and public interest (*maṣlaḥa*), basic rights and liberties merit greater attention; and (4) preference should be given to evidence-based scientific approaches.

---

[69] Authors include Muḥammad Yūsuf Mūsā, Muḥammad al-Ṣādiq ʿUrjūn; Muḥammad ʿAbd Allāh al-ʿArabī; Aḥmad Ḥuraydī; Taqī al-Dīn al-Nabhānī; Muhammad Asad (with a near equivalent title: *Minhāj al-Islām fī al-ḥukm*—the Islamic Guide on Government); and our Maḥmūd ʿAbd al-Majīd al-Khālidī respectively.

[70] Authors include our Muḥammad Diyāʾ al-Dīn al-Rayyis; Muḥammad Abū Fāris; Muhammad Selim el-Awa; Saʿdī Abū Ḥabīb; ʿAbd al-Ghanī Basyūnī ʿAbd Allāh; Sulaymān Muḥammad al-Tamāwī; and Muḥammad al-Mubārak.

[71] Authors include ʿAlī ʿAbd al-Rāziq; Fuʾād ʿAbd al-Munʿim Aḥmad; ʿAbd al-Ḥamīd Mutawallī; Muṣṭafā Kamal Waṣfī; Muḥammad al-Bahī; and Muḥammad Salām Madkūr.

[72] Those who wrote *al-Siyāsa al-sharʿiyya*, apart from Ibn Taymiyya and Ibn Qayyim, include twentieth-century scholars as ʿAbd al-Wahhāb Khallāf; ʿAlī al-Khafīf; Muḥammad al-Bannā; ʿAbd al-Raḥmān Tāj; and our Yūsuf al-Qaraḍāwī already cited here.

© 2016 Hartford Seminary.

Rashīd Riḍā (d. 1935) criticised the Māwardian theory for its departure from the spirit of the *sharīʿa* over the will and consensus of the community: 'It is wrong of some Muʿtazilites and *fuqahā'* to say that *bayʿa* is concluded with the participation of five, and even more so of the Ashʿarites, to say that *bayʿa* is concluded by one person when testified by witnesses. This is grossly erroneous and wrong.'[73]

In his renowned work, *The Caliphate*, Thomas Arnold also criticised al-Māwardī to say that in an ingenious way he worked it out such that the elective basis of the caliphate corresponded to what had become the practice of the Abbasid caliphs during his time. In this way, each one of them could appoint whom he wanted to succeed him.[74]

Muḥammad Diyā' al-Dīn al-Rayyis (d. 1977) provided rather a weak defense of the three classical methods of installing the caliph. There was no question over the first method by the *Ahl*, he says. As for the other two, namely *istikhlāf* and *istīlā'*, al-Rayyis stated that in both cases the *umma* remained the locus of political authority and that the outgoing caliph, in the case of *istikhlāf*, and the military commander, in the case of *istīlā'*, had to qualify the qualifications of imam. 'When the *fuqahā'* ruled that the imam can be validly installed through *wilāyat al-ʿahd,* they meant, even though not always articulating it, a *sharīʿa*-compliant imam only (*al-imām al-sharʿī faqaṭ*).'[75] On the permissibility of *istīlā'*, al-Rayyis cites the seven qualifications of al-Māwardī to ensure that the military ruler defends the religion and administers justice, adding that *istīlā'* is in any case accepted on an emergency basis. If *istīlā'* fulfills the juridical and religious stipulations of Islam, it is permissible.[76]

ʿAbd al-Ghanī Basyūnī ʿAbd Allāh points out that *bayʿa* is the validating factor of the whole process of accession to the highest office. This is clear in the works of the early scholars who have quoted general consensus in support of *bayʿa*. But when they wrote on *istikhlāf*, they relegated the process of *bayʿah* and gave it a different profile altogether.[77] He added that *istikhlāf* became no more than a nomination (*tarshīḥ*) and not a conclusive procedure by itself. If it were to have any credibility, it has to be followed by a general *bayʿa* of the community, failing which the nominee is not a juridically valid imam.[78]

ʿAbd al-Wahhāb Khallāf (d. 1956) also wrote that '*istikhlāf* can be accepted as nomination by the outgoing caliph, which needs, however, to be ratified by the community. The community is the locus of all authority; it is entitled to supervise the imam during his tenure of office, and also to depose him in the event he violates the terms of his *bayʿa*.'[79]

---

[73] Rashīd Riḍā, *al-Khilāfa aw al-imāmah al-ʿuẓma* (Cairo: Maṭbaʿat l-Manār, 1955), 12.
[74] Thomas Arnold, *The Caliphate* (Oxford: Clarendon Press, 1924), 70.
[75] Al-Rayyis, *al-Naẓariyyāt*, 237.
[76] Al-Rayyis, *al-Naẓariyyāt*, 283.
[77] ʿAbd al-Ghanī Basyūnī ʿAbd Allāh, *Naẓariyyat al-dawla fī al-Islām: Bahth muqāran fī al-daʿā'im al-ra'īsiyya li-l-dawla al-Islāmiyya wa-l-usus al-dustūriyya wa-l-qānūniyya allatī taqūmu ʿalayhā* (Beirut: al-Dār al-Jāmiʿiyya, 1986), 242.
[78] Basyūnī ʿAbd Allāh, *Naẓariyyat al-dawla*, 243.
[79] ʿAbd al-Wahhāb Khallāf, *al-Siyāsa al-sharbiyya aw niẓām al-dawlat al-Islāmiyya* (Cairo: al-Maṭbaʿat al-Salafiyya, 1350/1931), 57.

© 2016 Hartford Seminary.

In Muḥammad Yūsuf Mūsā's (d. 1963) assessment, 'from the viewpoints of both divinely-inspired law (*sharīʿa*) and human law (*qānūn*), designation of the caliph is not valid by the assignment merely of the outgoing imam to another person, even if the latter accepts it.'[80] Mūsā added that the consent and *bayʿa* of the wider community is necessary to validate *istikhlāf,* without which it remains as mere nomination that has no effect. Nomination as such may be exercised by the outgoing caliph or indeed any member of the Muslim community.

ʿAbd al-Majīd al-Najjār wrote that there is nothing in the juristic heritage of the imams of jurisprudence, let alone the scriptural sources, to the effect that the *ahl al-ḥall wa-l-ʿaqd* should represent the community in such a momentous task. He added on a sober note: 'we may confirm that this institution was introduced so as to strip the Muslim community of its authority and ability to develop its vision over the choice of the person who will be responsible for the implementation of that vision.'[81]

Some additional points I may add to this modern recension of the classical Māwardian paradigm:

(1) To quote Abū Bakr's nomination of ʿUmar and vice versa as authority to validate *istikhlāf* and dynastic hereditary practices of subsequent periods is less than convincing. A questionable analogy has evidently been drawn between the sound and the unsound. This is tantamount, in the terminology of *uṣūl al-fiqh*, to a discrepant analogy (*qiyās maʿa al-fāriq*), which renders it invalid.[82]

(2) The proposed restrictions on women's participation in *bayʿa* and governance are inconsistent with the fact that women were allowed to pledge *bayʿa* to the Prophet on at least two occasions: the First and Second Pledges of ʿAqaba in 620 and 622 respectively. The allegedly 'decisive' evidence on this stricture is actually indecisive and open to interpretation. A similar point can be made with regard to the *dhimmī*s. They are in fact allowed to be members of the *shūrā* councils to represent their communities at least. The Abbasids had, in fact, *dhimmī* ministers. Twentieth-century experience has actually moved away from these strictures: women are elected as presidents, prime ministers, ministers and leading judges in many Muslim countries, and the principle of common citizenship is now generally accepted, although challenges still remain. It is well to remember that the states of today, and most of the applied constitutions in Muslim countries, are not founded on a religious basis, whereas the caliphate essentially was. Applying classical rules of the caliphate to the modern nation-state is likely therefore to be problematic.

(3) A juridically flawed exception to the normal rules of contract has been made to call *istīlāʾ* as a unilateral contract. *Istīlāʾ* is takeover of power by military conquest. The idea of a contract has no place in such an exercise, and then to make that contract 'unilateral'

[80] Muḥammad Yūsuf Mūsā, *Niẓām al-ḥukm fī al-Islām* (Cairo: Dār al-Maʿārif, 1962), 118–119.
[81] ʿAbd al-Majīd al-Najjār, '*al-Dawla al-madaniyya bi-muwāṣafat al-Islāmiyya*' (paper presented at the international conference on 'Politics and Ethics' for the Faculty of Islamic Studies, Qatar Foundation, Doha, 11 June 2013), 38.
[82] For details on *qiyās maʿa al-fāriq*, see Kamali, *Principles of Islamic Jurisprudence*, 273ff.

© 2016 Hartford Seminary.

is quite extraordinary. How can a contract be unilateral? Islamic law knows the idea of a unilateral commitment, or *iltizām*, but that would also have no place here, simply because *istīlāʾ* is not in the nature of a commitment but a unilateral imposition.

(4) The Māwardian theory fails to lay down a procedure for the designation of the *Ahl* themselves. This leaves open the possibility of selecting candidates of questionable credibility.

(5) Al-Māwardī's suggestion that when designating his successor, in the case of *istikhlāf*, the outgoing imam acts in the capacity of a trustee—is also not devoid of forced logic. The assumption here is that when the outgoing imam designates his son, for instance, he acts as a trustee on behalf of the community. Someone who bypasses the community's consent and imposes his own will and choice on it can hardly be said to be acting as a trustee of that community.

Conclusion

I will end this contemporary perspective with the following several points on the nature of political jurisprudence in Islam:

(1) Direct analogies with the remote past may not be justified, yet the overall spirit of the orthodox caliphate (*khulafāʾ rāshidūn*) and the collective wisdom of subsequent articulations of political jurisprudence point to a participatory and consultative system of rule, which should be in line with the scriptural sources and valid precedent.

(2) The *bayʿa*, which may now be translated into a voting procedure, is the criterion of legitimacy. The method by which *bayʿa* takes place may vary, and it need not follow any particular precedent, but it must be such that it serves rather than undermines the integrity and credibility of the process of *bayʿa*. This could mean a vote-counting democracy, or some other consensus-based procedure, with the knowledge that voting may be open to further scrutiny in light of the frequent claims, in recent years, of rigged elections and voting irregularities.

(3) The *bayʿa* consists of two stages, as already explained: a nomination process, and a general *bayʿa*. It is important, therefore, that the nomination is carefully regulated and is, in fact, consultative, such that it represents a cross section of the various political interests. The process of nomination by itself carries no binding effect without the completion of a general *bayʿa*. The general *bayʿa* should be open to all citizens without any discrimination. Furthermore, the validity and duration of a given *bayʿa* should also be limited by the constitutional tenure of the political office of the state.

(4) Nomination may involve not just one but a number of candidates, depending on the existence or otherwise of credible political movements and interests in the country. The rules of nomination may confine a certain maximum number for the nominees.

(5) The Māwardian theory does not specify a method for the selection of the *Ahl* themselves. Hence it remains open to arbitrariness and biased election of usually pro-establishment candidates that may be of questionable credibility and competence.

© 2016 Hartford Seminary.

(6) A nomination by the outgoing office holder is likely to undermine the integrity of an orderly succession. We may suggest therefore that the outgoing head of government, for example, does not nominate anyone during his or her tenure of office. It is instructive that the Prophet (peace be upon him!), who established the first Muslim state in Medina, did not nominate anyone to succeed him.

(7) The nature of government in Islam ought to be grounded in consultation (*shūrā*), popular will (*ijtihād* and *bayʿa*) and public interest (*maṣlaḥa*). The weight of the medieval legacy need not bind subsequent generations of Muslims beyond that which can be rationalized from the scriptural sources of the Qur'an and *ḥadīth*.

(8) Lastly, no particular model or prototype of an Islamic system of rule can be found. A Muslim polity may consequently take a variety of forms and yet qualify itself as Islamic if it complies with a certain set of principles. Salient among these would be the maintenance of human dignity, *bayʿa,* consultation, justice, equality, freedom, public welfare *(maṣlaḥa)*, and trusteeship (*amāna*). Any system of rule that upholds such principles and repels anarchy and turmoil *(fitna)* and establishes peace and order in society qualifies as being Islamic. It may turn out to be similar to the historical caliphate, or different, or even a combination of completely new features.

© 2016 Hartford Seminary.